



REPUBLIC OF KENYA



KENYA LAW
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**Ngotho v Mduhiu (Environment and Land Appeal E041 of 2022)
[2026] KEELC 1675 (KLR) (12 March 2026) (Judgment)**

Neutral citation: [2026] KEELC 1675 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E041 OF 2022**

JG KEMEI, J

MARCH 12, 2026

BETWEEN

JOSPHAT KAMUNGE NGOTHO APPELLANT

AND

JOHN MAINA MDUHIU RESPONDENT

*(Being an appeal against the judgment of Hon Lesootia Saitabau
(PM) delivered on 12/5/2022 at the CMELC NO 8599 of 2019)*

JUDGMENT

1. Aggrieved by the decision of the trial Court delivered on the 12/5/2022 the Appellant proffered this Appeal on the following grounds;
 - a. The Learned Trial Magistrate erred in both law and fact when he relied solely on an allotment letter allegedly issued by Nairobi City Council as sufficient proof to establish the Respondent's claim of ownership of Plot No. 38 situate at Kimathi, Industrial Area Nairobi (hereafter known as "the suit property") despite the fact that its authenticity had been disputed by the Appellants.
 - b. The Learned Trial Magistrate erred in both law and fact when he relied solely on an allotment letter propounded by the Respondent to establish ownership of the suit property despite its evident non-compliance with the law.
 - c. The Learned Trial Magistrate erred in both law and fact when he relied on the uncorroborated evidence of the Respondent to establish his claim of ownership of the suit property.
 - d. The Learned Trial Magistrate erred in both law and fact when he failed to adequately pronounce himself in his judgment regarding all aspects of the Appellant's counterclaim before arriving at a decision dismissing the same.



- e. The Learned Trial Magistrate failed to appreciate the law and evidence that was tendered hence arriving at the wrong decision.
2. Consequently, the Appellant sought the following orders;
- a. The appeal be allowed and entire judgment of the subordinate Court be set aside and/or varied.
 - b. The Appellant be declared the legal owner of the suit property upon determination of the Appeal.
 - c. An eviction order to be issued against the Respondent to remove him from occupation of the suit property.
 - d. A permanent injunction restraining the Respondent, his servants and/or agents from trespassing, alienating, disposing off or otherwise interfering with the Appellant's quiet use and possession of the suit property.
 - e. An order directing the 2nd Defendant in the Amended Counterclaim to facilitate the transfer of the suit property to the Appellant.
 - f. Special damages as set out and pleaded in paragraph 8 of the Amended Counterclaim.
 - g. Mesne profits as set out and pleaded in paragraph 18 of the Amended Counterclaim and from occupation.
 - h. In the alternative and without prejudice to the foregoing the Court be pleased to order a retrial with a view to conclusively resolving the dispute over ownership of the suit property.
 - i. Costs of this Appeal be awarded to the Appellant
 - j. Any other order commending itself to the court.
3. From the proceedings on record, this Appeal was lodged on 26/5/2022 via a Memorandum of Appeal of the same date. After several requests for confirmation that the trial Court record had been received, the file was finally presented before the appeal judge for admission. On 6/1/2025, however, the Appellant's Counsel informed the Court that she had not yet filed the record of Appeal. She requested additional time to do so, which the court granted. On 16/12/2025, she informed the Court that she had filed the said record online, and the court admitted the appeal and issued directions regarding the filing of submissions.
4. When the Court retired to prepare the judgment, it discovered that the said record of Appeal, although filed online in the Court tracking system, was incomplete without the statement of defences. The documents are also missing from the trial court record placed before Court.
5. [Order 42, rule 13.] Directions before hearing. 13.
- (1) On notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the appellant shall cause the Appeal to be listed for the giving of directions by a judge in chambers.
 - (2) Any objection to the jurisdiction of the appellate court shall be raised before the judge before he gives directions under this rule.
 - (3) The judge in chambers may give directions concerning the Appeal generally and in particular directions as to the manner in which the evidence and exhibits presented to the Court below shall be put before the appellate court and as to the typing of any record or part thereof and any



exhibits or other necessary documents and the payment of the costs of such typing whether in advance or otherwise.

- (4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the Court record, and that such of them as are not in the possession of either party have been served on that party, that is to say:
- (a) the Memorandum of Appeal;
 - (b) the pleadings;
 - (c) the notes of the trial magistrate made at the hearing;
 - (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
 - (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
 - (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal: Provided that—
 - (i) a translation into English shall be provided of any document not in that language;
 - (ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).
6. What is before the Court, therefore, is an incomplete record of the Appeal. What makes it perplexing is that it is the Appellant, who is the aggrieved party in this case, and therefore duty-bound to present a complete record of the Appeal to the court. In this case, the Appellant failed to include his own defence in the record.
7. Speaking of an incomplete record of Appeal, the Supreme Court, in dealing with a similar issue, in *Bwana Mohamed Bwana vs Silvano Buko Bonaya & 2 others* [2015] eKLR, stated that failure to attach the decree from which the appellant was appealing goes to the root of the Appeal. The Court expressed itself thus, at paragraph 41 of its said decision:
- “Without a record of Appeal, a Court cannot determine the Appeal cause before it. Thus, if the requisite bundle of documents is omitted, the Appeal is incompetent and defective, for failing the requirements of the law. A Court cannot exercise its adjudicatory powers conferred by law, or *the Constitution*, where an Appeal is incompetent. An incompetent Appeal divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues.”
8. In the case of *Richard Ncharpi Leiyagu vs Independent Electoral and Boundaries Commission & 2 others* [2013] eKLR, this Court pronounced itself on the issue of an incomplete record of appeal as follows:
- “Whereas we underscore the importance of a party filling a complete Record of Appeal, we are of the view that the Respondents too could have filed the documents that were left out; but more importantly the Respondents could have applied to strike out the Appeal. Raising the issue at the hearing cannot aid the Respondents because nowadays pendulums have



swung and the Courts have shifted towards addressing substantive justice and no longer worship at the altar of technicalities.”

9. In the circumstances of this case, the court finds that adjudicating on the Appeal in the state in which it is may occasion injustice to parties, more so the Appellant, who is the aggrieved party in this case.
10. Final orders for disposal
 - a. It is therefore for the above reason that the court finds the appeal incomplete and therefore incompetent.
 - b. I proceed to strike it out with no orders as to costs.
11. Orders accordingly

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 12TH DAY OF MARCH 2026 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered online in the presence of:

Ms. Marina H/B for Makori for the Appellant

Mr. Mariaria for the Respondent

CA- Ms Yvette Njoroge

